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No. 550

In the Supreme Court of the United States

OCTOBER TERM, 1958

ROBERT E. FUNKHOUSER, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The District Court's opinion (R. 1a–4a) [1] is not reported. The opinion of the Court of Appeals (Pet. 1a 4a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1958. Motions for rehearing were denied on November 3, 1958. (Pet. 4a–5a.) The petition for a writ of certiorari was filed on December 1, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

[1] Record references are to the Appendix to the petitioner's brief in the United States Court of Appeals for the Fourth Circuit.

QUESTION PRESENTED

Whether a motion to correct sentence, filed almost five years after the sentence had been served, was properly denied where it appeared that the judgment of conviction authorized the sentence imposed and that the motion merely sought to challenge the sufficiency of the evidence to convict.[2]

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C., Sec. 145 (b)).

Federal Rules of Criminal Procedure:

RULE 35. Correction or Reduction of Sentence

The court may correct an illegal sentence at any time. The court may reduce a sentence

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[2] An additional contention with respect to venue was advanced below but has been abandoned here.

within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

STATEMENT

Petitioner was indicted on January 17, 1950, and charged in separate counts with five willful attempts to evade federal income taxes for the years 1943 through 1947. After a trial which lasted from May 20, 1952, until June 5, 1952, the jury returned a verdict of guilty on each count. No motion for a new trial or request for postponement of sentence having been made, petitioner was sentenced on June 6, 1952. A fine of $5,000 on each of the five counts of the indictment and a sentence of one year's imprisonment were imposed. (R. 1a–2a.)

The evidence showed understatements of net taxable income resulting from numerous deductions (totalling about $90,000) which the Government contended were willfully and fraudulently taken. Taxpayer testified at great length concerning them. The jury was instructed that, although many of the claimed items were not properly deductible as a matter of law, the important consideration was whether they had been claimed in good faith or bad faith, and, if the jury found that they were deducted mistakenly or accidentally, they should acquit. The jury was also instructed that they should not find a verdict of guilty unless they found the alleged attempt to evade taxes was willful beyond a reasonable doubt, and the mean-

ing of "wilful" in the context was explained. (R. 3a)

A motion to extend time for appeal, tardily filed on June 20, 1952, and a separate motion to reduce sentence were denied on September 10, 1952. On the same day there was filed with the clerk a written notice signed by petitioner and dated June 6, 1952, waiving appeal and electing to begin service of the sentence. (R. 2a.)

Petitioner served the one year sentence of imprisonment and has paid the fine. (R. 2a.)

On March 28, 1958, petitioner filed the instant motion which stated that it was filed under Rule 35 of the Federal Rules of Criminal Procedure. The District Court (Judge Chesnut, who had presided at the trial), after consideration of petitioner's written and oral arguments, denied the motion on June 2, 1958. His opinion pointed out that the sentence was much less than the punishment authorized by Section 145 (b) of the Internal Revenue Code of 1939; that no fact was alleged in the motion to show that the court was without jurisdiction; and that the motion was not based on any newly discovered evidence or any other ground which would tend to show petitioner did not have a fair trial. (R. 1a–4a.)

Noting that the instant motion could not be used as a substitute for an appeal, the Court of Appeals affirmed.

ARGUMENT

Petitioner has here abandoned his argument, advanced below, that as a resident of the District of Columbia he was not subject to indictment and trial for income tax evasion in the United States District

Court for the District of Maryland. He now merely contends (Pet. 5–23) that his motion to correct the sentence he had already served should have been granted because, prior to a precise computation and assessment of his civil tax liability, his criminal conviction was necessarily invalid. This contention misconceives the scope of a motion to correct sentence under Rule 35 of the Federal Rules of Criminal Procedure, *supra*, pp. 2–3, and is, in any event, without substance.

Sentences subject to correction under Rule 35 are those which the judgment of conviction did not authorize. *United States* v. *Morgan*, 346 U. S. 502, 506; *Cook* v. *United States*, 171 F. 2d 567, 570 (C. A. 1st), certiorari denied, 336 U. S. 926; *Fooshee* v. *United States*, 203 F. 2d 247 (C. A. 5th). The motion does not, and cannot, assert that the sentence here imposed was not within the maximum (imprisonment for 5 years and fine of $10,000) authorized for each violation of Section 145 (b) of the Internal Revenue Code of 1939, *supra*, p. 2. *Rose* v. *United States*, 128 F. 2d 622, 626–627 (C. A. 10th), certiorari denied, 317 U. S. 651. The motion does not allege any violation of procedural due process, and it cannot be maintained that the District Court did not have jurisdiction of both petitioner and the subject matter. *Bowles* v. *United States*, 73 F. 2d 772, 773–774 (C. A. 4th), certiorari denied, 294 U. S. 710.

In contending that a precise computation and assessment of his civil tax liability were conditions precedent to any criminal prosecution for willful attempted tax evasion, the petitioner is, in effect, chal-

lenging the sufficiency of the evidence to convict. As the Court of Appeals noted, however, even if the motion were available as a substitute for an appeal, there is no merit in the contention. *Ford* v. *United States,* 233 F. 2d 56, 58–59 (C. A. 5th), certiorari denied, 352 U. S. 833; *Comerford* v. *United States,* 64 F. 2d 28, 30 (C. A. 2d), certiorari denied, 289 U. S. 759.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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